Supreme Court, U.S.
FILED
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No. 85-1422

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

SHERMAN TREATERS LTD.,

Petitioner,

vs.

ANDREAS AHLBRANDT,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENTS

Thomas O. Kloehn
780 N. Water St.
Milwaukee WI 53202
(414) 277-5000

Counsel for
Respondent

Of Counsel:
Daniel F. Attridge
Kirkland & Ellis
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5012

QUESTIONS PRESENTED FOR REVIEW

1. Do threats by a licensee to sue a competitor for patent infringement create a case or controversy between the competitor and the patentee invoking the jurisdiction of the federal courts under art. III, § 2, cl. 1, of the U.S. Const.?

2. Do threats by a licensee to sue a competitor for patent infringement create "a case of actual controversy" between the competitor and the patentee entitling the competitor to declaratory relief under 28 U.S.C. §2201?

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION ARTICLE III

. . .

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to controversies . . . between citizens of different States, . . . and foreign States, citizens or subjects.

. . .

STATEMENT OF THE CASE

Respondent, Andreas Ahlbrandt, is a citizen of the Federal Republic of Germany residing in Lauterbach, State of Hessen,

West Germany, and at the time of the commencement of this action he was the owner of U.S. Patent No. 4,446,110. Respondent is also the founder and chief executive officer of a West German corporation named Ahlbrandt System GmbH, which is also located in Lauterbach.

U.S. Patent No. 4,446,110 relates to corona treater stations, and Ahlbrandt System GmbH makes, among other things, corona treater stations of the sort that are disclosed and claimed in that patent. Ahlbrandt System GmbH sells and exports some of those corona treater stations to Enercon Industries Corporation, which is a corporation of the state of Wisconsin that has its principal office in Menomonee Falls, Wisconsin, which is a western suburb of Milwaukee, in the Eastern Dis-

trict of Wisconsin. There is no other relationship between Enercon Industries Corporation and Ahlbrandt System GmbH.

Enercon, which has an exclusive license under U.S. Patent No. 4,446,110 to use and sell those treater stations together with authority to enforce the patent against infringers, assembles those treater stations with high frequency, high voltage power supplies of its own manufacture, and sells the combination as an Enercon corona treater system. Other than the license agreement, there is no other relationship between Enercon Industries Corporation and the respondent, Andreas Ahlbrandt.

Corona treater systems are used to expose the surface of plastics and metal

foils to a high energy electrical discharge called a corona. The result of corona treatment is to make glues and inks, which would otherwise be shed by the plastic or metal surfaces, adhere to those surfaces making it possible to print on such surfaces or laminate such materials.

Petitioner, Sherman Treaters Ltd., is a British corporation which manufactures corona treaters, some of which it exports to the United States, and sells, either directly or through its wholly owned Canadian subsidiary, in competition with Enercon. Petitioner alleges that representatives of Enercon have told customers in the United States that if petitioner imports corona treater stations into the United States, Enercon would sue

petitioner for patent infringement. For the purposes of the summary judgment review of which is sought, those allegations are deemed true.

Respondent has never made any threats, directly or indirectly, expressly, by implication, innuendo or tacitly to sue the petitioner for patent infringement, or accused petitioner of infringing his patent.

Enercon has not acted with the authority, knowledge or even approval of the respondent in making the alleged threats. Enercon is not an agent of respondent or otherwise authorized to speak for him.

Without making any inquiry into the relationship between Enercon and respondent or respondent's patent, the peti-

tioner filed this action against respondent, Andreas Ahlbrandt, in the U.S. District Court for the District of Columbia. Respondent moved for Summary Judgment under Rule 56 Fed. R. Civ. P. dismissing this action for lack of federal jurisdiction.

The District Court, reviewing all of the evidence and the briefs submitted by the parties and hearing argument by counsel for the parties, ruled that the statements allegedly made by Enercon to customers did not create a case or controversy between petitioner and respondent within the meaning of Article III, Section 2 of the U.S. Constitution. The District Court granted respondent's motion and dismissed this action.

Petitioner appealed to the Court of Appeals for the Federal Circuit which reviewed the decision of the District Court and all of the evidence of record and found that, "Since Treaters failed to present any evidence that Enercon's alleged acts were committed for or on behalf of Ahlbrandt, there is simply no case or controversy between Treaters and Ahlbrandt, as there must be." (A-4) Moreover, the Court of Appeals for the Federal Circuit acting under its Rule 18 elected not to publish any opinion. Rule 18 of the Court of Appeals for the Federal Circuit states, in pertinent part,

> Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published in commercial reports of decisions.

That same rule also provides that

> A party may, on motion, request that an unpublished opinion be reissued as a published opinion, citing reasons therefor.

Neither petitioner nor respondent requested a published opinion.

SUMMARY OF THE ARGUMENT

The Petition's argument for Certiorari is based upon petitioner's false labeling of Enercon as an "agent" and "representative" of respondent. Although petitioner does not acknowledge the contradiction, petitioner's labeling contradicts the consistent findings of both lower Courts. There is no evidence supporting petitioner's labeling, and petitioner neither cites any evidence nor contends that there is a genuine issue of material fact.

On the undisputed facts, there is no relationship between Enercon and respondent other than that of licensee and licensor, and any acts by Enercon were committed entirely independently of respondent, exclusively upon Enercon's authority, in Enercon's name, on Enercon's behalf and for the benefit of Enercon.

Petitioner's arguments regarding the proper title for Enercon's license, and Enercon's right to bring suit on the patent have no pertinence here. Whatever remedy and relief to which petitioner is entitled, petitioner can obtain in its pending action in the U.S. District Court for the Eastern District of Wisconsin against Enercon.

Petitioner has presented no authority challenging respondent's right to summary

judgment as a matter of law. Consequently, there is no reason justifying this Court's review.

ARGUMENT

I. PETITIONER SEEKS REVIEW OF A SUMMARY JUDGMENT BUT DOES NOT CONTEND THAT ENTRY OF SUMMARY JUDGMENT WAS ERROR.

This case was decided on cross motions for summary judgment. Any analysis or evaluation of the Petition must begin with recognition that review of a summary judgment is requested.

In the District Court, petitioner moved for summary judgment on the merits in its favor. Respondent moved for summary judgment dismissing the action for lack of federal jurisdiction. Respondent's motion was granted, and, of course,

the District Court took no action on petitioner's motion for summary judgment.

The Court of Appeals for the Federal Circuit affirmed the District Court without published opinion, finding that this case "does not add significantly to the body of law and is not of widespread legal interest." (A-1) Petitioner apparently agreed for it did not file a motion requesting publication, as that Court's Rule 18 allows.

In ruling on those summary judgment motions, the District Court was governed by the principles set forth by this Court in Poller v. Columbia Broadcasting System, Inc., et al., 368 U.S. 464, 467, 82 S. Ct. 486 at 488 (1962),

> Summary judgment should be entered only when the pleadings,

> depositions, affidavits, and admissions filed in the case "show that [except as to the amount of damages] no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. Rules Civ. Proc., 28 U.S.C.A. This rule authorizes summary judgment "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, [and where] no genuine issue remains for trial [for] the purpose of the rule is not to cut litigants off from the right of trial by jury if they really have issues to try." Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S.Ct. 724, 728, 88 L.Ed. 967 (1944). We now examine the contentions of the parties to determine whether under the rule summary judgment is proper.

However, this case does not appear to require determination whether under the rule summary judgment was proper, because neither party contends that summary judgment was not proper. Nowhere

in the Petition for Certiorari is there a contention or argument, either express or implied, that summary judgment should not be entered in this case.

The Petition does not request any relief from this Court. It states only that, "This case mandates review." (p.29) Of course, the relief available on appeal from summary judgment is limited to affirmance, or reversal and remand for further proceedings in the District Court. Fountain v. Filson, et al., 336 U.S. 681, 69 S. Ct. 1153 (1949). However, petitioner has not requested reversal, and appends no materials to its Petition upon which this Court could determine whether any reversible error could have been made by the lower Courts.

II. PETITIONER DOES NOT REQUEST TRIAL OF ANY ISSUE OF FACT.

A. Petitioner Tacitly Admits That No Genuine Issue Remains For Trial.

The Petition is silent as to whether any genuine issue of fact remains for trial. The Petition does not expressly concede that there are no genuine issues of material fact. However, the Petition does not contend that any genuine issues of material fact exist, and it does not identify any such issues. Consistent with the admission by that silence, there are no "other appended materials" (Supreme Court Rule 21.1(k)(iv)) in the Petition on the basis of which this Court could evaluate the propriety of the summary judgment entered in this case.

Therefore, the factual findings of the lower Courts are to be accepted as undisputed. However, this reveals a singular anomaly. Though petitioner does not challenge the findings of the lower Courts, the Petition's version of the facts, without argument, elucidation or explanation in any form, repeatedly contradicts the lower Courts'. As a result, petitioner and the lower Courts appear to address two entirely different cases.

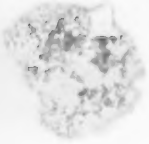
B. The Petition Disingenuously Misrepresents The Undisputed Material Facts Of This Case.

The District Court noted that petitioner claimed ". . . that Enercon acted on behalf of . . . [respondent] . . . as an agent or representative." (B-5)

Reviewing the record, the District Court made the following findings:

> Plaintiff, however, presented no relevant evidence that Enercon had specific authority to speak on behalf of defendant. (B-14)
>
> . . . [Respondent] . . . Ahlbrandt engaged in no conduct to cause plaintiff to believe that he consented to the charges of Enercon. . . . [Respondent] . . . had no communication whatsoever with . . . [Petitioner] . . . (B-18)
>
> He could have done no more to avoid creating in Enercon the appearance of authority to speak on behalf of defendant. Moreover, Enercon made no suggestion that it was acting on behalf of anyone but itself. (B-19)

The Court of Appeals stated that ". . . [Petitioner] . . . seeks to impute the acts of Enercon to Ahlbrandt, the patent owner." (A-3) That Court held,



> Since . . . [Petioner] . . . failed to present any evidence that Enercon's alleged acts were commited for or on behalf of . . . [Respondent] . . ., there simply is no case or controversy between . . .[Petitioner] . . . and . . .[Respondent] . . ., (A-4)

Nevertheless, beginning with the "QUESTIONS PRESENTED" the petitioner labels Enercon respondent's "sole" or "exclusive" "marketing agent" and "marketing representative" eighteen times, without any supporting record citation, or explanation.

Petitioner does offer an argument on page 20, saying, "It is, pursuant to the Marketing Agreement, simply an exclusive marketing agent, . . ." but in footnote 1 on page 5, petitioner admits, "Since respondent never produced the underlying

Marketing Agreement, the term or conditions thereof are not known." The Petition falsely states that respondent was ordered to produce the Marketing Agreement (p.4) when in truth, the order referred to the patent license which was produced.

An agent is, by definition, one who has authority to act for another. Black's Law Dictionary 59 (rev. 5th ed. 1979). Both lower Courts addressed petitioner's contention and found the record devoid of evidence to support it, or to create an issue for trial. To treat by labeling that as established fact which the lower Courts expressly rejected for lack of evidentiary support, is, to say the least, disingenuous.

A petitioner certainly has the right to challenge the lower Court's fact

findings and legal conclusions, but the petitioner's obligation of candor and accuracy requires disclosure of such contradictions. To conceal behind labels its contradiction of the Courts' finding on a determinative fact is deceptively misleading, and falls far short of the ". . . accuracy, brevity and clearness . . ." required by this Court's rules. Supreme Court Rule 21.5.

III. PETITIONER DOES NOT CONTEND THAT ANY ERROR OF LAW WAS MADE OR THAT ANY MODIFICATION OF LAW IS APPROPRIATE.

A. Petitioner's Arguments Are Only Verbal Joustings With Windmills.

Petitioner argues that Enercon has only an implied license under respondent's patent (p.9), and that the District Court "mischaracterized the relationship between

"respondent and Enercon" by calling Enercon an exclusive licensee, because Enercon's exclusive license is only to use and sell. (pp.19-20) Petitioner contends that to be called an "exclusive licensee," the license must encompass the rights to use, sell and make. (Id.) Such semantic quibbling merely converts the District Court's analogy to precedents into an a fortiori analogy.

The District Court analogized this case to two precedents which held that an exclusive licensee's threats of infringement suits did not create a case or controversy between the alleged infringer and the patentee. (B-21-23) If Enercon is less than an exclusive licensee, it is that much further removed from respondent,

and a fortiori Enercon's threats can not be imputed to respondent.

Petitioner also argues at length that Enercon does not have authority to bring suit on respondent's patent. (pp.23-28) That argument may be pertinent to petitioner's pending action against Enercon in the Eastern District of Wisconsin, but it is immaterial here. Petitioner tacitly assumes that the issuance of a U.S. patent is an actionable wrong for which the law should be contorted to find a remedy for petitioner. But as the District Court declared, quoting from W.R. Grace & Company v. Union Carbide Corp., 319 F. Supp. 309-10, "'[T]he mere existence of the patent is not a cloud on title, enabling any appre-

hensive manufacturer to remove it by suit.'" (B-11). It is Enercon's alleged threats that create the cause. If Enercon can sue on the patent, petitioner can challenge the patent in its suit against Enercon, and if Enercon cannot sue on the patent, petitioner has whatever remedy it is entitled to in the general law. Determination of whether or not Enercon can sue on the patent does not affect petitioner's right to sue respondent.

Petitioner's legal contentions neither add to nor detract from its claims here, but could obfuscate the issues.

B. Petitioner Has Not Challenged Respondent's Right To Summary Judgment As A Matter Of Law.

Petitioner's veiled assault on the lower Courts' consistent findings that

there are no genuine issues of material fact, and no evidence that could impute Enercon's alleged threats to respondent does not demonstrate errors by those Courts. Petitioner's legal arguments attempting to disparage the status of Enercon's license have no bearing on the determinative legal issues in this case.

On the undisputed facts as found by both lower Courts, none of the precedents cited by petitioner support petitioner's contention. All of the authorities require the threats of infringement suits to be imputable to the patentee as a prerequisite to a declaratory judgment action. Consequently, petitioner has failed to challenge respondent's right to summary judgment as a matter of law on the authorities cited by the lower Courts.

IV. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW, OR ANY OTHER REASON FOR GRANTING CERTIORARI.

Contrary to petitioner's characterization of the precedent created by the District Court's decision (the decision and opinion of the Court of Appeals cannot be cited as a precedent, Rule 18(a) Rules of the United States Court of Appeals for the Federal Circuit), this case stands for the proposition that threats by a stranger to the parties do not create a case or controversy between the parties for the purposes of federal jurisdiction under Art. III, § 2 of the U.S. Const. This result is entirely consistent with the precedents of this Court and all other authorities. Contrary

to the Petition (p.29), the patent bar is not waiting with bated breath for clarification of that proposition.

Moreover, three judges including the Chief Judge of the Court of Appeals for the Federal Circuit, after reviewing the record and arguments of the parties found that its ". . . opinion . . . does not add significantly to the body of law and is not of widespread legal interest." On authority of its Rule 18, that Court decided not to publish its opinion in this case. That Court's Rule 18 provides, in pertinent part,

> Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not be published . . . A party may, on motion, request that an unpublished opinion be reissued

as a published opinion, citing reasons therefor.

Neither party thought the questions involved important enough to move for publication. In short, no judge or lawyer prior to the Petition for Certiorari thought this case involved important federal questions. Nothing has happened to change that appraisal, petitioners half-hearted efforts to inflate the significance of this case with vague generalities to the contrary notwithstanding.

None of the other considerations set forth in Rule 17 of this Court's Rules could possibly apply, except a call for this Court's power of supervision. However, the acts of the lower Courts do not call for this Court's supervisory

power; it is the conduct of petitioner in filing this petition and misrepresenting this case that demands supervision.

V. THIS PETITION FOR CERTIORARI IS FRIVOLOUS.

Petitioner's false labeling of Enercon as respondent's "agent" establishes the frivolousness of this Petition beyond dispute. It broadcasts petitioner's appreciation that its Petition is without merit. The only possible motive for petitioner's false labeling is to lend the appearance of merit to an otherwise meritless case by deceiving this Court. These shenanigans violate the express mandate in Rule 21.5 of this Court's Rules, if such misrepresentation needs further prohibition.

Rule 49.2 of this Court's Rules provides that the Court may award appropriate damages to respondent when a petition for certiorari is frivolous. Respondent requests an award of his costs including reasonable attorney's fees.

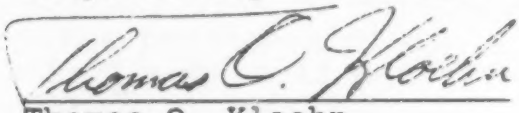
CONCLUSION

Since Petitioner's argument depends upon its mislabeling of the relationship of Enercon to respondent as that of an agent, for which there is no supporting evidence, the Petition is without merit and should be denied. Since the mislabeling was undeniably deliberate, the Petition is ineluctably frivolous, and petitioner should be ordered to reimburse respondent for his costs, including

reasonable attorney's fees necessarily incurred as a result of this Petition.

March 24, 1986

Respectfully submitted



Thomas O. Kloehn
780 N. Water Street
Milwaukee, WI 53202
(414) 277-5000
Counsel for Respondent

Of Counsel:
Daniel F. Attridge
Kirkland & Ellis
655 15th Street N.W.
Washington, D.C. 20005
(202) 879-5012

TKO10:F

CERTIFICATE OF FILING

Thomas O. Kloehn, who is a member of the Bar of this Court and attorney for respondent, certifies that he filed 40 copies of respondent's Brief in Opposition to Petition for Certiorari within the time specified for filing by depositing 40 copies thereof in the United States Mail with First-Class postage prepaid and addressed to the Clerk of the United States Supreme Court on this date.

Dated March 24, 1986.

Thomas O. Kloehn
780 N. Water Street
Milwaukee, WI 53202
(414) 277-5000
Counsel for Respondent

Subscribed and sworn to
before me this 24th day
of March, 1986.

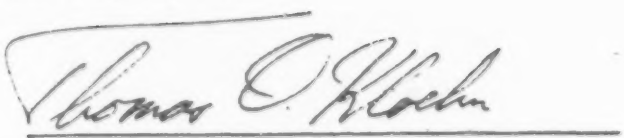
Notary Public, Milw.,WI
My Commission is permanent.

CERTIFICATE OF SERVICE

I, Thomas O. Kloehn, certify that I have served 3 copies of respondent's Brief in Opposition to Petition for Certiorari upon petitioner by depositing 3 copies thereof in the United States Mail with adequate First-Class postage affixed thereto, addressed to its attorney as follows:

Burton L. Lilling, Esq.
Lilling & Greenspan
123 Main Street
White Plains, NY 10601

Dated March 24, 1986.



Thomas O. Kloehn